



THE COMMONWEALTH OF MASSACHUSETTS
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AO-97-16

Albert S. Robinson, Town Counsel
Town of Wellesley
40 Grove Street
Wellesley, MA 02181

Re: Expenditure of public funds to distribute information to voters

Dear Mr. Robinson:

This letter is in response to your request for an opinion regarding the Town Advisory Committee's expenditure of public funds to distribute information to voters. We regret the long delay in responding to your request.

Question

Should the Town of Wellesley's Advisory Committee use municipal funds to disseminate to voters "neutral reports, which explain the impact of a pro and con vote on a ballot question, but do not advocate yes or no"?

Answer

No.

Facts

Your letter related to two questions on a town election ballot. Although the Committee did not send information to voters regarding the ballot question, the opportunity to do so is likely to occur in the future and you have asked for guidance for prospective use.

In the election, voters were asked to support or reject a town meeting vote to remove the police and fire departments from civil service.

You suggest that the Advisory Committee was authorized by town bylaw to prepare and distribute a report to all voters containing the Committee's analysis of the impact of a ballot question. Specifically, you have pointed to Wellesley Town Bylaw 11.3, which specifies that the Committee may

also consider and make reports or recommendations on other matters, including without limitation referenda questions, which in the Committee's judgment affect the interests of the Town (emphasis added).

You have stated that the bylaw, in effect since 1987, was enacted under the apparent authority provided by the General Laws, specifically, M.G.L. c. 39, s. 16. Section 16 provides that certain towns, including Wellesley, are authorized by bylaw to "provide for the election or the appointment and duties of appropriation, advisory or finance committees who shall consider any or all municipal questions for the purpose of making reports or recommendations to the town..." (Emphasis added).

You acknowledge that municipal funds may not be used to advocate the pro or con side of a ballot question by sending information regarding a question to voters. You ask if section 16 (especially when considered together with the Wellesley bylaw) establishes an exemption for "neutral" reports distributed by advisory or finance committees.

Discussion

A. The Anderson Opinion

In Anderson v. City of Boston, 376 Mass. 178 (1978), the Supreme Judicial Court concluded that the City of Boston could not appropriate funds, or use funds previously appropriated for other purposes, to influence a ballot question submitted to the voters at a State election. The court stated that the campaign finance law demonstrates an intent "to assure fairness of elections and the appearance of fairness in the electoral process" and that the law should be interpreted as prohibiting the use of public funds "to advocate a position which certain taxpayers oppose." 376 Mass. at 193-195.

Accordingly, this office has concluded that "governmental entities" may not expend public resources¹ or contribute anything of value in support of or opposition to a ballot question.² See interpretive bulletin IB-91-01 (a copy of which is enclosed, for information). Finance and advisory committees are considered to be governmental entities within the scope of the prohibition. See AO-89-02. In addition, public resources may not be used to distribute even admittedly objective information to voters regarding a ballot question unless expressly authorized by state law. See Guide to Campaign Practices, issued by the Secretary of State's Elections Division and this office and revised in 1995.

In Anderson the court emphasized that the campaign finance law is "comprehensive legislation [which] manifests an intention to bar municipalities from engaging in the expenditure of funds to influence election results . . . This comprehensive legislation requires the reasonable inference that the Legislature "intended to preclude the exercise of any local power or function on the same subject because otherwise the legislative purpose of that statute would be frustrated." 376 Mass. at 185 (citation omitted).

Subsequent to Anderson, the Legislature has enacted special laws allowing certain municipalities to distribute ballot question information to voters. Only three municipalities (Cambridge, Newton and Sudbury) have obtained such legislation. In each instance, the legislation contains safeguards to ensure that information contains arguments provided by both sides of an issue.

¹ Public resources include, but are not limited to: staff time, office space, stationery and office supplies, office equipment such as telephones, copier and fax machines and word processors, as well the use of a state, county or municipal seal. Even the occasional, minor use of public resources for a political purpose is inconsistent with state law and should be avoided.

² The prohibition does not apply "in connection to . . . issues which are debated in an open forum such as town meeting." See IB-93-07. Therefore, a report which relates exclusively to a town meeting warrant article could be distributed using public funds. Similarly, public funds could be used to lobby a legislative body or for other purposes not designed to influence the voters, e.g., the preparation of a report for use by a town committee or other public body acting in its official capacity.

See ch. 630 of the Acts of 1989 (Cambridge), ch. 274 of the Acts of 1987 (Newton), and ch. 180 of the Acts of 1996 (Sudbury).³ In addition, the Legislature has enacted statutory provisions which allow municipalities to distribute information to voters in certain specific instances. See, e.g., M.G.L. c. 43B, s. 11 (providing for a charter review commission's distribution of a report to voters). See also M.G.L. c. 50, s. 6 (laws relating particularly to any city or town shall prevail where they are in conflict with the provisions of chapter 55). Given the manner chosen by the Legislature to provide for the distribution of voter information by municipal governments, the most appropriate solution to the Wellesley Advisory Committee's desire to distribute neutral reports to voters regarding a local ballot question would be to file legislation similar to the special laws previously enacted for other communities.

B. Application of Section 16 of chapter 39 in the context of the campaign finance law

Unlike the above-referenced special laws, section 16 does not authorize the distribution of information to voters regarding ballot questions. Section 16, however, can be harmonized with chapter 55. The reference in section 16 to "the town" is not synonymous with "all voters of the town." To construe the section to allow distribution of information regarding ballot questions to voters in general, using public resources, would create an unnecessary conflict with the campaign finance law. In addition, the reference to "municipal questions" does not require a conclusion that finance or advisory committees may issue reports about referenda questions. There are many instances where the "questions" which might be considered and reported on by finance committees would not be ballot questions.

Where the general laws provide guidance regarding the construction of the term "town," the guidance suggests that the term may generally be considered to apply to the town itself and the officers and employees of the town, rather than to the voters of the town. See M.G.L. c. 4, s. 7 ("Town," when applied to towns or officers or employees thereof, shall include city.").

Construing "town" in the context of section 16 to mean town officials or town meeting members would be consistent with the statute's historical context: When section 16 was enacted in 1910, its mandate for reports to be made "to the town" would have been understood as meaning that such reports would be made to residents meeting and deliberating in town meeting. As observed by one judge of the period, a town meeting "is implied whenever the word 'town' is used in [the constitution] . . ." In re Opinion of the Justices, 229 Mass. 601 (1918) cited in Mass. Practice Series vol. 18, Randall and Franklin, s. 151.

The use of the term "questions" in section 16 appears to relate primarily to questions pending before town meeting, not ballot questions appearing on a ballot in a town election. The distinction between municipal ballot questions and town meeting warrant articles is a relatively recent creation which did not exist when section 16 was enacted. "Questions" were at that time generally not put on the ballot; instead they were considered in town meeting. Various chapters of the General Laws now contain sections which become effective only when favorably voted on by the voters in a town election. The overwhelming majority of these sections, however, were not enacted by the Legislature until the 1930s or later. See, e.g., M.G.L. c. 43A, s. 10 (which authorizes voters in town election to overrule a representative town meeting vote); M.G.L. c. 53, s. 18A (authorizing non-binding public opinion advisory questions to be placed on local ballots); and M.G.L. c. 43B, s. 11 (authorizing proposed charter revision to be submitted to voters). See also the Secretary of State's Elections Division's "Guide to Ballot Questions" which contains a list of similar provisions.

Consistent with this understanding of the terms "town" and "questions," the Advisory Committee may produce a report regarding the impact of a ballot question to be distributed to town

³ The Cambridge and Newton acts authorize the elections commissions in those cities to distribute information; the Sudbury act authorizes the Board of Selectmen to distribute the information.

officials or, if the ballot question relates to a matter before town meeting, to members of Wellesley's representative town meeting. In addition, such a report can be made available to persons requesting copies, pursuant to the public records law, including a representative of a ballot question committee or other group which may copy and distribute the report with private funds. As noted in the enclosed interpretive bulletin, a ballot question committee or other group distributing the report would be required to disclose its expenditures on forms available from this office or the town clerk.

This office recognizes that section 16 may reasonably be interpreted in different ways and that the Attorney General's office has approved Wellesley's bylaws, including Bylaw 11.3. We have previously advised, however, that section 16, when considered in conjunction with chapter 55, should be read conservatively, i.e., it should not be read to allow public funds to be used to distribute reports to voters regarding referenda questions.

Section 16 or chapter 55 could be amended to clarify the issue. Until legislation is enacted, however, the Advisory Committee should know that private parties could file legal actions against the Town challenging the Advisory Committee's use of public funds or resources to distribute a report regarding a ballot question. We would therefore suggest that the Advisory Committee not distribute reports or recommendations, absent legislative or judicial action clarifying the meaning of section 16.

This opinion is provided on the basis of representations in your letter, and is solely within the context of the campaign finance law.

I encourage you to contact us in the future if you have further questions, or if you wish this office's assistance in drafting special legislation, similar to the legislation enacted on behalf of Cambridge, Newton and Sudbury, enabling the Town of Wellesley to distribute information to voters.

Sincerely,



Michael J. Sullivan
Director

cc: Peter Sacks, Assistant Attorney General
Kathleen Colleary, Division of Local Services
John Cloonan, Elections Division

MJS/cp